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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 138

KENTUCKY WHIP AND COLLAR COMPANY,
Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

BRIEF OF AMICI CURIÆ IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

HARRY B. HAWES,
RAYMOND A. WALSH,
BON GEASLIN,
Amici Curiæ.

Counsel for:
Cordage Institute,
The American Federation of Labor,

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CONSENT TO FILE BRIEF.

Consent of the petitioner in the above entitled cause is hereby granted to Harry B. Hawes, Raymond A. Walsh and Bon Geaslin to file amicus curiæ, a brief in opposition to the petition for writ of certiorari herein.

(Signed) ~~WILLIAM~~ I. DAWSON,
Attorney for Petitioner.

Consent of the respondent in the above entitled cause is hereby granted to Harry B. Hawes, Raymond A. Walsh and Bon Geaslin to file amicus curiæ, a brief in opposition to the petition for writ of certiorari herein.

(Signed) BLAKEY HELM,
TRABUE, DOOLAN, HELM & HELM.

This brief is filed by the undersigned on behalf of the Cordage Institute and the American Federation of Labor, both of whom have an interest in the outcome of this litigation as extensive as the parties thereto.

The Cordage Institute is a trade association composed of the manufacturers of a major percentage of hard fiber cordage and twine products manufactured in private factories in the United States, with plants located throughout the country, and whose investment and whose thousands of employees have been, are, and will continue to be affected by the operation of the Act, the validity of which is here questioned.

The American Federation of Labor, representing the organized working men and women of the United States, has a vital concern in the effect and operation of the Act here questioned, in that it bears directly upon a subject matter of interstate commerce affecting the lives and fortunes of its members.

BRIEF OF AMICI CURIÆ IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Petitioner here seeks a writ of certiorari as set forth in its petition relying upon the point that the Act of Congress, approved July 24, 1935 (49 Stat. 494; 49 U. S. C. A. Secs. 61-64), commonly known as the **Ashurst-Sumners** Act is violative of the Commerce Clause and other provisions of the Constitution of the United States.

OPINIONS OF COURTS BELOW.

The opinion of the District Court of the United States for the Western District of Kentucky (R. 29) is reported in 12 Fed. Supp. 37.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 52) was rendered June 1, 1936 and is reported in 84 F. (2d) 168.

JURISDICTION.

The decree of the United States Circuit Court of Appeals for the Sixth Circuit was entered June 1, 1936 (R. 51). The jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code, as amended, (Sec. 347, Title 28 U. S. C. A.).

QUESTION PRESENTED.

Whether the Act of Congress entitled "An act to prohibit the interstate transportation of prison-made products in certain cases," approved July 24, 1935, (49 Stat. 494; 49 U. S. C. A., Secs. 61-64), commonly known as the **Ashurst-Sumners** Act, and providing that it shall be unlawful to transport or cause to be transported, goods made by convict-labor into any state where the same are intended to be used or sold in violation of the law of such state, and requiring that packages containing convict-made goods when shipped in interstate commerce be marked to show the name and address of the shipper, the nature of the contents, and the name and location of the institution where produced, is violative of the Constitution of the United States, as exceeding the power of Congress to regulate commerce among the states.

STATUTE INVOLVED.

The Act under attack in this case is set out in full in the petition for writ of certiorari (pp. 2 and 3).

STATEMENT OF THE CASE.

The petitioner brought its bill in the District Court of the United States for the Western District of Kentucky alleg-

ing that it is engaged in the manufacture, with the labor of convicts confined in the Kentucky State Penitentiary at Eddyville, Kentucky, of horse collars and strap goods, and that it has built up a large and valuable business in the sale of such products **to the trade** throughout the United States; that on August 13, 1935, in fulfillment of certain **bona fide** orders theretofore received it tendered to the respondent railroad company several separate shipments of horse collars and strap goods manufactured with prison labor, for the purpose of having the shipments transported to the consignees thereof, each of whom was located in a state other than Kentucky. The respondent company refused to accept said shipments because prohibited by the Act of Congress referred to above.

Several of the shipments tendered were consigned to customers in states whose laws prohibit the sale of any goods, wares or merchandise manufactured or produced, wholly or in part, by convict labor. Certain of the shipments were consigned to customers in states whose laws require that any convict-made goods sold or offered for sale be plainly marked so as to indicate the fact that they are convict-made. The names of these customers would indicate that they are dealers in and resellers of the articles so consigned. Certain of the shipments were consigned to states whose laws impose no restrictions whatever upon the sale of convict-made goods.

There is no allegation in the bill that any of the packages containing said convict-made goods and tendered for shipment were marked as required by Section 2 of the Act.

The petitioner sought a mandatory injunction requiring the railroad company to accept and transport each of the shipments tendered, and to accept and transport all future shipments of a similar character, and an order restraining the railroad company from refusing to accept and transport all shipments of convict-made goods which may be

tendered it by the petitioner, and asked for a binding declaration of rights as between the petitioner and respondent, decreeing and adjudging said Act of Congress to be invalid as violative of the Constitution of the United States (R. 1-23).

A motion to dismiss the bill was filed by the respondent herein, the principal grounds of which were that the bill of complaint set forth no facts which would entitle the plaintiff to the relief sought; that the act of Congress complained of is constitutional and affords no basis for the relief sought by petitioner; and that the bill of complaint on its face shows a lack of equity (R. 24).

By stipulation (R. 25) the case was submitted upon this motion, and a preliminary injunction was issued August 26, 1935 (R. 26).

The facts, as found by the District Court are substantially as alleged in the bill, except that the Court found that the products of the petitioner are not in themselves harmful to the health, peace or good order of the communities into which they are shipped, or in which they are used (R. 41).

Petitioner filed a motion for an additional finding of fact (R. 43) that the articles involved are not in and of themselves, in any particular, harmful to the general welfare of the communities into which they are shipped, which motion was overruled (R. 43).

The District Court found as its conclusions of law that the petitioner had no adequate remedy at law; that the Act of July 24, 1935, in so far as it operates to prohibit the shipment in interstate commerce of convict-made goods into those states which prohibit the sale or possession of such goods is invalid and beyond the constitutional power of Congress; that the Act in so far as it prohibits the shipment of convict-made goods into states which require that such goods shall be labeled so as to indicate the fact, before being sold or offered for sale, unless such goods are so labeled

before interstate shipment, is a valid exercise of the power of Congress under the Constitution; that Congress has the power to require that the containers of all convict-made goods shipped in interstate ccommerce shall, before shipment, be so labeled as to indicate that the contents are convict-made, together with the name and location of the prison where made; that Section 2 of the Act is separable, valid and enforceable; that the portion of Section 1 which operates to prohibit shipment of unlabeled convict-made goods into those states prohibiting their exposure for sale, or sale, unless so labeled, is separable from the other part of Section 1 of the Act, and is valid and enforceable; that the petitioner did not label the articles tendered to the respondent for shipment to those states requiring convict-made articles to be labeled before sale or exposure for sale; that the respondent was not required to accept such shipments and to transport same to their destination; that the petitioner did not mark any of the containers of any of the shipments enumerated in the bill as required by the Act, and therefore the respondent was not required to accept any of such shipments or transport the same (R. 41-42).

The petitioner's bill was accordingly dismissed at its cost, and the preliminary injunction theretofore issued was continued in force pending an appeal (R. 42). The petitioner appealed to the United States Circuit Court of Appeals for the Sixth Circuit and that Court held the entire Act to be constitutional and affirmed the decree of the District Court dismissing the bill (R. 51). It is asserted by the petitioner that the **Ashurst-Sumners** Act is violative of the Constitution of the United States in that it is not a valid exercise of the power of Congress to regulate commerce among the States; that it contravenes the Fifth and Tenth Amendments to the Constitution of the United States; and that it attempts to delegate to the several

States the prohibition and regulation of interstate commerce.

ARGUMENT.

I.

THE RIGHT OF THE CONGRESS TO PASS LEGISLATION IN AID OF THE ENFORCEMENT OF STATE LAWS IS NO LONGER OPEN TO QUESTION.

This Court recently had occasion to consider the validity of an Act of Congress entitled, "An Act to divest goods, wares and merchandise manufactured, produced or mined by convicts or prisoners of their interstate character in certain cases", approved January 19, 1929 (45 Stat. 1084, 49 U. S. C. A., Sec. 65), known as the **Hawes-Cooper** Act, and the provisions of a statute enacted by the Legislature of the State of Ohio, prohibiting the sale on the open market of that state of convict-made goods. The Act of Congress was sustained by this Court as a proper exercise of the power to regulate commerce among the states, and the statute of Ohio was sustained as a proper exercise of the police power of said state. Whitfield v. Ohio, — U. S. —, 80 L. ed. 527 (Decided March 2, 1936).

Thirty States have enacted legislation regulating the sale of convict-made goods. Twenty-four of these States prohibit such sales, and six States require that such goods, when offered for sale, must be labeled to show the fact that they are convict-made. The **Ashurst-Sumners** Act was enacted to aid those States in the enforcement of their laws respecting the sale of convict-made goods.

The situation which led to the enactment of such legislation was so fully discussed in the briefs filed in the **Whitfield case, supra** that the argument will not be repeated here. The necessity for the statute is amply demonstrated

by the petitioner's bill of complaint by which petitioner indicates that not only has it been engaged in violating valid State laws with respect to the sale of prison-made goods prior to the passage of this Act, but that it expects to continue to do so.

It is significant to note that the District Court in this case recognized the evil inherent in the traffic in prison-made goods and overruled a motion of the petitioner herein for an additional finding of fact to the effect that the articles involved in this controversy are not in and of themselves in any particular harmful to the general welfare of the communities into which they were shipped. The evil resulting from the sale of prison-made goods in competition with goods produced by private enterprise with free labor was recognized by this Court in the **Whitfield** case in the following language:

> "The view of the State of Ohio that the sale of convict-made goods in competition with the products of free labor **is an evil,** finds ample support **in fact** and in the similar legislation of a preponderant number of the other States. Acts of Congress relating to the subject also recognize the evil." (Emphasis ours.)
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> "All such legislation, **state and federal,** proceeds upon the view that free labor, properly compensated, cannot compete successfully with the enforced and unpaid or underpaid convict labor of the prison. **A state basing its legislation upon that conception has the right and power, so far as the federal Constitution is concerned,** by non-discriminating legislation, **to preserve its policy from impairment or defeat, by any means appropriate to the end** and not inconsistent with that instrument." (Emphasis ours.)

It would seem unnecessary to review at length the cases in which this Court has held that the Congress may legis-

late to suppress an evil whether that evil results from the inherent nature of the articles sought to be suppressed or from the effect of their use or disposition.

One of the cases illustrating the application of this principle is **Champion v. Ames**, 188 U. S. 321, 47 L. ed. 492, which sustained an act of Congress **prohibiting** the importation into the United States or the transportation from one state to any other state of **"any paper, certificate or instrument"** purporting to be or represent a lottery ticket (28 Stat. 963, Sec. 387, Title 18, U. S. C. A.). The Supreme Court in sustaining this absolute prohibition of interstate commerce in lottery tickets stated:

> "We are of opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers, is a regulation of commerce among the several states." P. 354, (500).
>
> "If lottery traffic, carried on through interstate commerce, is a matter which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic and simply regulate the manner in which it may be carried on? Or may not Congress, **for the protection of the people of all the states**, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the states?" P. 355 (501). (Emphasis ours.)

We emphasize that the Court did not base its decision upon the ground that the "paper, certificate or instrument" was **inherently** harmful or deleterious. In fact such article in itself is no more harmful or deleterious than the articles involved in this case. The decision was based upon the fact that many states of the Union had recognized "the evils

that inhere in the raising of money in that mode," and that therefore, the action of Congress

> "only supplemented the action of those states—perhaps all of them—which, for the protection of public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce." P. 358 (502).

The Congress has enacted a statute **prohibiting** the transportation of stolen motor vehicles in interstate or foreign commerce (41 Stat. 324, Sec. 408, Title 18, U. S. C. A.). This act was sustained by this Court in **Brooks v. United States**, 267 U. S. 432, 69 L. ed. 699, although a stolen automobile **per se** is no more harmful than one not stolen, but is merely the instrument by which the evil sought to be abated was accomplished. Mr. Chief Justice Taft, speaking for the Court in that case, stated that:

> "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the **spread of any evil or harm to the people of other states from the state of origin.**" P. 436 (701). (Emphasis ours.)

In the case of **Hippolite Egg Co. v. United States**, 220 U. S. 45, 55 L. ed. 364, it was held to be within the regulatory power of Congress to **prohibit** the transportation in

interstate commerce of adulterated **or misbranded** articles of food. This legislation also was supplementary to legislation which had been enacted in many of the states prohibiting the sale of such adulterated or misbranded articles.

In the case of **Hoke v. United States**, 227 U. S. 308, 57 L. Ed. 523, the prohibition by Congressional enactment, of the transportation in interstate commerce of women and girls for immoral purposes was sustained as a valid exercise of the power vested in Congress to regulate commerce among the states. This statute was in aid of the enforcement of State laws forbidding prostitution, and the same argument was urged against its validity that is being asserted here—that it was an unconstitutional invasion of the rights reserved to the states. But it was pointed out by the Court that:

> "There is unquestionably a control in the states over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the states, but there is a domain which the states cannot reach and over which Congress alone has power; **and if such power be exerted to control what the states cannot, it is an argument for—not against—its legality.** Its exertion does not encroach upon the jurisdiction of the States." P. 321 (527). (Emphasis ours.)
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>
> "Motives executed by actions may make it the concern of government to exert its powers. Right purpose and fair trading need no restrictive regulation, but let them be transgressed, and penalties and prohibitions must be applied. We may illustrate again by the **pure food and drug act. Let an article * * * be misrepresented by false branding, and Congress may exercise its prohibitive power.**" P. 322 (527). Emphasis ours.)

So it is in this case. The right of the States to prohibit or otherwise regulate the sale of prison-made goods having been established, the exercise by Congress of its power to regulate interstate commerce—a subject-matter which cannot be reached by the States—in such a manner as will aid in the enforcement of State laws, is an argument for, and not against, the validity of this statute.

It makes no difference that some of the states have determined that the general welfare of their citizens will be best served by requiring prison-made goods to be labelled, rather than by prohibiting their sale altogether.

It is a matter of common knowledge and of public record that contracts with prison authorities for the products of prison labor, generally contain a clause that the contractor shall have the right to rescind the contract if Federal or State legislation shall be enacted by which it shall be unlawful to sell or transport prison-made products, or to materially restrict the marketing of such products, **or to require a label showing the origin of such goods.** Such a contract is printed in full in the case of **Rice v. State,** 108 Okla. 4, 232 Pac. 807. Section 8 of the contract furnishes a typical example of such a provision and reads:

> "Sec. 8, This contract shall continue in effect for a period of seven (7) years from and after the date of its execution, provided, however, that in the event of future federal regulation forbidding the transportation of prison-made work shirts in interstate commerce or requiring that such work shirts be labeled to show their source of origin, before being removed in interstate commerce, the Company shall have the right to terminate this contract upon sixty days notice in writing to the Board; and further in the event of any other legislation, state or federal, which the Board in good faith shall find to be unfavorable to the sale or transportation of work shirts sold under this contract, the

company shall have a like right to terminate this contract on like notice."

If there is one proposition of law which is firmly established by the decisions, it is that the freedom of commerce among the States does not demand a recognition of the right to practice a deception upon the public in the sale of any article.

It cannot be urged that by requiring merchandise to be sold for just what it is, and by preventing its sale as something other than it is, a person is deprived of his property without due process of law, for the Constitution does not secure to any one the privilege of representing his goods as the goods of somebody else. This doctrine has been so firmly established and so frequently affirmed by this Court that argument in support of it is no longer necessary. See **Plumley v. Massachusetts**, 155 U. S. 461, 39 L. ed. 223; **Schollenberger v. Pennsylvania**, 171 U. S. 1, 43 L. ed. 49; **Hutchinson Ice Cream Co. et al. v. Iowa**, 242 U. S. 153, 61 L. ed. 217. **Hygrade Provisions Co., Inc., et al. v. Sherman, as Attorney General of the State of New York, et al.**, 266 U. S. 497, 69 L. ed. 402; **Powell v. Pennsylvania**, 127 U. S. 678, 32 L. ed. 253; **Hippolite Egg Co. v. United States**, 220 U. S. 45, 55 L. ed. 364; **State of Wyoming v. W. S. Buck Mercantile Co. et al.**, 264 Pac. 1023, 57 A. L. R. 675.

As was said by the court below, such labeling "merely prevents deceit and gives the public information of value to it, in determining whether or not it desires to purchase and use products manufactured in a penitentiary" (R. 37).

The cases relied upon by the petitioner to support its contention that a State may not require convict-made goods to be labeled are **People v. Hawkins**, 157 N. Y. 1, 42 L. R. A.

490; **Arnold v. Yanders,** 56 Ohio St. 417, 47 N. E. 50, and the **Opinion of Justices of the Supreme Judicial Court of Massachusetts,** 211 Mass. 605, 98 N. E. 334. The decisions in these cases were based upon the proposition that the statutes involved placed a burden upon interstate commerce, and that the silence of Congress upon the subject operated to prevent States from adopting such legislation. It was pointed out in the **Arnold** case, **supra,** that "To give a state legislature power to legislate in such cases, requires an Act of Congress to that effect."

This objection has since been removed by the **Hawes-Cooper** Act, and it can no longer be asserted that Congress may not aid in the enforcement of the policies of those States which have enacted statutes requiring the labeling of convict-made articles.

We submit therefore, that the decision of the Circuit Court of Appeals, sustaining this Act in its entirety, is in absolute conformity with all the decisions of this Court.

II.

THE POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE IS NOT RESTRICTED TO ARTICLES INHERENTLY HARMFUL.

The petitioner asserts that in passing upon acts of Congress completely or partially prohibiting interstate transportation of certain articles the courts have always drawn a distinction between articles which were harmful **per se** and those which were not.

The federal statutes relating to the prohibition of interstate commerce in certain commodities may be divided into two principal classes; first, regulations which involve a complete prohibition of transportation, and second, regulations which involve prohibition only in part, that is, those

which take into consideration the variations in state laws and make provisions in aid of their enforcement.

In the first classification, we find statutes have been enacted prohibiting the interstate transportation of "any paper, certificate or instrument" purporting to be or represent a lottery ticket, prohibiting the transportation in interstate commerce of adulterated or misbranded articles of food, prohibiting the interstate transportation of women and girls for immoral purposes, prohibiting the interstate transportation of stolen automobiles, prohibiting the importation and interstate transportation of prize fight films, and prohibiting interstate transportation of goods, wares and merchandise manufactured or produced by children within the ages specified in the statute.

In the second classification, examples may be found in the **Wilson** Act (26 Stat. 313), subjecting intoxicating liquor imported into dry states to the operation and effect of the laws thereof; the **Oleomargarine** Act (32 Stat. 193), subjecting oleomargarine transported into a state to the operation and effect of the laws thereof; the **Lacey** Act (31 Stat. 187), making the same provisions with respect to the dead bodies of game birds and game animals, and in addition, prohibiting the transportation of such birds and animals out of any state where they had been taken or shipped in violation of the laws; the **Webb-Kenyon** Act (37 Stat. 699), prohibiting the transportation of intoxicating liquors into any state where they are intended to be used in violation of the laws; the **Reed** amendment (39 Stat. 58), prohibiting the ordering, purchasing, or transportation in interstate commerce (except for certain specified uses) of intoxicating liquors into states, the laws of which prohibit the manufacture or sale therein of such liquors; the **Hawes-Cooper** Act, subjecting prison-made goods transported into any state to the operation and effect of the laws thereof; and the **Connally** Act of February 2, 1935 (49 Stat. 30), prohibiting the

Act of February 2, 1935 (49 Stat. 30), prohibiting the transportation out of any state of oil produced in violation of its laws.

It is significant to note that in only one instance has the Supreme Court declared a statute within the first classification to be unconstitutional. This was the **Child Labor** Act (39 Stat. 432), which was invalidated by this Court in **Hammer v. Dagenhart**, 247 U. S. 251, 62 L. ed. 1101.

It is even more significant to note that in no case has the Supreme Court declared a statute of the second classification to be unconstitutional. The statute here clearly falls within the second category, since the prohibition is effective only where the State of destination prohibits the sale or requires the labeling of prison-made goods.

And the significance of these decisions further increases when it is recalled that the **Child Labor** statute is the only one of either classification which did not purport to have been enacted by the Congress in aid of the enforcement of State legislation theretofore enacted.

The basic principle underlying the decision upon each of those statutes was that while the articles themselves (whether intoxicating liquor, game birds, stolen automobiles, or lottery tickets) might not be inherently harmful, the traffic in such articles resulted in evils antagonistic to the general welfare, and therefore, the States might prohibit, or otherwise regulate such traffic, and the Congress might legislate to prevent the use of interstate commerce in the violation of state laws.

In other words, the test of the power is found, not in the inherent nature of the articles themselves, but in the effect the business of dealing in such articles has upon the public weal. This principle was clearly recognized in the **Child Labor** case where this Court said that the decisions establishing the validity of regulatory statutes which prohibited interstate transportation of certain articles "rest upon

the character of the particular subjects dealt with, and **the fact that the scope of governmental authority**, State or national, **possessed over them is such**" that the regulation made in each instance was justified. (Emphasis ours.)

And as was stated by this Court in **Hebe Company v. Shaw**, 248 U. S. 297, 303, 63 L. ed. 255, 259:

> "If the character or **effect of the articles as intended to be used** 'be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury,' or, we may add, by the personal opinion of judges, 'upon the issue which the legislature has decided.'" (Emphasis ours.)

Such a clear distinction exists between the **Child Labor** statute and the one under consideration here that it would seem to require no argument to show it. The **Child Labor** statute was declared to be unconstitutional on the ground that the prohibition of interstate transportation of products manufactured by child labor constituted an attempt to coerce the **manufacture of commodities in accordance with regulations and standards prescribed by the Congress**, regardless of the laws regulating the labor of children in either the State of origin or destination. The present statute, as we have pointed out, is a measure regulating the transportation and sale of prison-made goods, and is intended to prevent the evils resulting from the sale of prison-made goods in violation of valid laws in the State of destination.

In view of the decisions, therefore, we submit that the Act here is a valid exercise of the power of Congress to regulate commerce among the states.

III.

CONGRESS HAS THE POWER TO REQUIRE THE LABELING OF ALL PACKAGES OF CONVICT-MADE GOODS SHIPPED IN INTERSTATE COMMERCE.

Section 2 of this Act requires that all packages containing any convict-made goods, where transported in interstate commerce, be plainly marked to show the name and address of the shipper, the nature of the contents, and the name and location of the penal or reformatory institution where produced. But it is urged by petitioner that the Congress does not have power to require that shipments of convict-made goods be so marked.

In other words, the whole argument of the petitioner is to the effect that while Congress has the power to regulate commerce in articles produced by free labor and by private enterprise, it has no authority to place any restraint upon the traffic in the products of human misfortune, even to the extent of requiring honest dealing in such products; that the only authority Congress has with reference to these commodities is to remain silent, since if Congress acts at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured.

In answer to this it is only necessary to cite the language of this court, in the case of **In re Rahrer**, 140 U. S. 545, 562, 35 L. ed. 572, 577:

> "We recall no decision giving color to the idea that when Congress acted its action would be less potent than when it kept silent.
>
> "The framers of the Constitution never intended that the legislative power of the Nation should find itself incapable of disposing of a subject matter specifically committed to its charge."

The language of this section follows very closely the language found in Section 393 Title U. S. C. A. (31 Stat. 188) which relates to packages containing the dead bodies of game animals and birds, the constitutionality of which has been determined. **Rupert v. United States**, 181 Fed. 87; **LaCoste v. Department of Conservation of State of Louisiana**, 263 U. S. 544, 68 L. ed. 437.

A similar statute relating to the marking of packages shipped in interstate commerce and containing intoxicating liquors (Sec. 390, Title 18, U. S. C. A.), has also been sustained. **United States v. Freeman**, 239 U. S. 117, 60 L. ed. 172; **One Truck Load of Whisky v. United States** (C. C. A. Ohio), 247 Fed. 99. The validity of this section, therefore, is firmly established.

IV.

THE LANGUAGE OF THE ACT HERE UNDER CONSIDERATION HAS BEEN CONSTRUED TO BE A PROPER REGULATION OF INTERSTATE COMMERCE.

This Court in the case of **Whitfield v. Ohio, supra**, held:

> "That act (the Hawes-Cooper Act) is in substance the same as the Wilson Act with respect to intoxicating liquors, passed August 8, 1890, c. 728, 26 Stat. 313, as construed and upheld by this Court. **Rhodes v. Iowa**, 170 U. S. 412, 421-423, 426; **In re Rahrer**, 140 U. S. 545, 559-560, 562, 564."
>
> . . . . . .
>
> "If the power of Congress to remove the impediment to state control presented by the unbroken-package doctrine be limited in any way (a question which we do not now find it necessary to consider), it is clear

that the removal of that impediment in the case of prison-made goods **must be upheld for reasons akin to those which moved this Court to sustain the validity of the Wilson Act.**" (Emphasis ours.)

* * * * * * *

"3. That the Hawes-Cooper Act does not constitute a delegation of Congressional power to the States is made clear by **In re Rahrer, supra,** pp. 560-561, and by what we have already said under subdivision 2."

The **Ashhurst-Sumners** Act is in substance the same as the **Webb-Kenyon** Act with respect to intoxicating liquors, which was upheld in the case of **Clark Distilling Company v. Western Maryland Railroad Company,** 242 U. S. 311, 330, 61 L. ed. 332, 340. In that case the Court said:

"**As the power to regulate which was manifested in the Wilson Act, and that which was exerted in enacting the Webb-Kenyon Law, are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other,** we are unable to understand upon what principle we could hold that the one was not a regulation without holding that the other had the same infirmity—a result which, as we have previously said, would reverse Leisy v. Hardin and overthrow the many adjudications of this court sustaining the Wilson Act." (Emphasis ours.)

Therefore, the Congress in adopting the language used in the earlier Act must be considered to have adopted also the construction given such language by this Court and to have made it a part of the enactment. **Hecht v. Malley,** 265 U. S. 144, 68 L. ed. 949.

CONCLUSION.

We submit, therefore, that the decisions of this Court are conclusive as to the validity of the statute here under attack, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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